

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

SUMMARY ORDER

**THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.**

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, in the City of New York, on the 17th day of August, Two thousand and six.

PRESENT:

HON. DENNIS JACOBS,  
HON. ROBERT D. SACK,  
HON. RICHARD C. WESLEY,  
*Circuit Judges.*

\_\_\_\_\_  
Bertin Longwa,  
\_\_\_\_\_*Petitioner,*

-v.-

No. 05-6558-ag  
NAC  
A79-327-572

Alberto R. Gonzales, Attorney General,  
*Respondent.*

FOR PETITIONER: Michael Boyle; Justin Conlon, Law Offices of Michael Boyle,  
North Haven, Connecticut.

FOR RESPONDENT: Mary Beth Buchanan, United States Attorney; Paul E. Skirtich,  
Assistant United States Attorney; Holly M. Smith, Paralegal  
Specialist, Pittsburgh, Pennsylvania.

UPON DUE CONSIDERATION of this petition for review of the Board of Immigration Appeals (“BIA”) decision, it is hereby ORDERED, ADJUDGED, AND DECREED that the petition for review is GRANTED, the decision of the BIA is VACATED, and the case

1 REMANDED for further proceedings consistent with this decision.

2 Bertin Longwa, through counsel, petitions for review of the November 2005 BIA order  
3 denying his motion to reopen removal proceedings. The BIA had previously denied Longwa's  
4 motion to reconsider its May 2004 decision dismissing his appeal from Immigration Judge ("IJ")  
5 Michael W. Strauss's decision summarily denying his application for asylum, withholding of  
6 removal, and relief under the Convention Against Torture, for failure to timely file a brief. We  
7 assume the parties' familiarity with the underlying facts and procedural history.

8 When the BIA dismisses an appeal from the denial of a motion to reopen, this Court  
9 reviews the BIA's decision for an abuse of discretion. *Twum v. INS*, 411 F.3d 54, 58 (2d Cir.  
10 2005). An abuse of discretion may be found where the BIA's decision "provides no rational  
11 explanation, inexplicably departs from established policies, is devoid of any reasoning, or  
12 contains only summary or conclusory statements; that is to say, where the Board has acted in an  
13 arbitrary or capricious manner." *Ke Zhen Zhao v. U.S. Dep't of Justice*, 265 F.3d 83, 93 (2d Cir.  
14 2001) (internal citations omitted).

15 Here, the BIA abused its discretion in denying Longwa's motion to reopen because its  
16 decision was "devoid of any reasoning," and Longwa clearly demonstrated due diligence. *Kaur*  
17 *v. BIA*, 413 F.3d 232, 233 (2d Cir. 2005); *Ke Zhen Zhao*, 265 F.3d at 93; *see also Jin Bo Zhao v. ,*  
18 *INS*, -- F.3d --, 2006 WL 1681102 (2d Cir. June 20, 2006) (holding that BIA erred in rejecting an  
19 alien's second motion to reopen as time-barred and number-barred where "the ineffective  
20 assistance of the attorney who filed [the petitioner's] first motion to reopen -- combined with [the  
21 petitioner's] impressive diligence in retaining new counsel and promptly filing a new motion --  
22 justifie[s] the application of 'equitable tolling' of the BIA's time and number regulations"). The

1 BIA simply noted that Longwa met with current counsel ten months prior to the filing of the  
2 motion and that it did not agree that the delay in filing it was reasonable. On the contrary, the  
3 record sets forth in great detail the lengths that Longwa and his current counsel went to in order  
4 to present a thorough motion, replete with affidavits and reports in support of Longwa's asylum  
5 claim.

6 Longwa indicated that after the BIA denied his motion to reconsider in July 2004, he first  
7 discussed his options with his prior counsel, Anastasi. After Anastasi stated that he could not file  
8 an appeal to the Second Circuit, Longwa contacted an attorney in New York, Mike Brown. He  
9 explained that Brown referred him to a different attorney, James McLain, whom Longwa called  
10 several times, without a response. Longwa stated that he next contacted the International  
11 Institute who referred him to his current counsel, Michael Boyle and Justin Conlon. He met with  
12 them immediately in November, but they told him that they required an initial payment to begin  
13 the case, and that he should try to get more documents from people in the DRC. Longwa  
14 indicated that he collected money from his church, obtained another letter from his uncle and a  
15 letter from Mumba Gama, secretary-general of the RCD, and then met with counsel again with  
16 the payment in February 2005. While the amount of the initial fee is unspecified, this Court has  
17 found the payment of an attorney fee to be a factor supporting due diligence. *See Jin Bo Zhao*,  
18 2006 WL 1681102 at \*4. Current counsel took measures to have Longwa thoroughly evaluated  
19 by a licensed clinical social worker over five sessions between March and April of 2005. The  
20 social worker provided an assessment indicating that Longwa suffered from post-traumatic stress  
21 disorder, a condition which could "tremendously affect his ability to lay out the details of his  
22 case." Conlon himself indicated that he met with Longwa in "numerous three-hour sessions" to

1 prepare an affidavit on his behalf, which totaled thirty pages. Additionally, Conlon remarked on  
2 having had to sort through a voluminous number of reports concerning the DRC from the  
3 preceding five years in order to find those reports specifically demanded by the IJ and that  
4 corroborate Longwa's claim. Indeed, articles from sources such as the BBC and UNHCR  
5 indicate that Lunda Bululu was a former prime minister under Mobutu who defected from the  
6 RCD, and whose family members were arrested and detained in the DRC for varying periods.

7         Given the need for Longwa to overcome the underlying adverse credibility and  
8 insufficient documentation findings, and to lay out a cogent claim of ineffective assistance, it was  
9 especially important that the instant motion be comprehensive. Therefore, although Longwa  
10 filed his motion to reopen about eleven months beyond the ninety-day time period, the BIA  
11 unreasonably declined to equitably toll the filing deadline, in light of the conscientiousness with  
12 which Longwa and his counsel approached the filing of the motion. *Cf. Zheng Zhong Chen v.*  
13 *Gonzales*, 437 F.3d 267, 270 (2d Cir. 2006) (holding that the BIA did not abuse its discretion in  
14 finding no equitable tolling to accommodate reopening of a case, where the petitioner stood by  
15 his fabricated asylum application before the IJ and BIA, and then waited 20 months to raise the  
16 ineffectiveness claim); *Iavorski v. INS*, 232 F.3d 124, 129-34 (2d Cir.2000) (concluding, as a  
17 matter of law, that the alien had failed to exercise due diligence during the nearly two-year period  
18 he sought to have tolled). While the BIA is not required to specifically address each claim that  
19 the petitioner has made, its November 2005 decision does not reflect the reasoned consideration  
20 that would suggest it has taken into account all of the evidence before it, namely, the painstaking  
21 efforts made by Longwa and his counsel to file a meticulously laid out and exhaustive motion.  
22 *See Xiao Ji Chen v. U.S. Dep't of Justice*, 434 F.3d 144, 160 n.3 (2d Cir. 2006).

1 Furthermore, Longwa's motion to reopen based on ineffective assistance of counsel  
2 appears to have conformed with the *Lozada* requirements, because it was supported by an  
3 affidavit, as well as verification that counsel whose competence is being impugned was informed  
4 of the allegations leveled against him and given an opportunity to respond, and that a complaint  
5 was filed with the appropriate disciplinary authorities with respect to violations of that counsel's  
6 ethical and legal responsibilities. *See Matter of Lozada*, 19 I. & N. Dec. 637, 639 (BIA 1988).  
7 Accordingly, the BIA was required to provide more than summary or conclusory statements as to  
8 the manner in which Longwa failed to make a prima facie case for eligibility for relief. *See*  
9 *Kaur*, 413 F.3d at 233-34; *Ke Zhen Zhao*, 265 F.3d at 93.

10 For the foregoing reasons, the petition for review is GRANTED, the November 2005  
11 decision of the BIA is VACATED, and the case REMANDED for further proceedings consistent  
12 with this decision. Having completed our review, any stay of removal that the Court previously  
13 granted in this petition is VACATED, and any pending motion for a stay of removal in this  
14 petition is DENIED as moot. Any pending request for oral argument in this petition is DENIED  
15 in accordance with Federal Rule of Appellate Procedure 34(a)(2), and Second Circuit Local Rule  
16 34(d)(1).

17 FOR THE COURT:  
18 Roseann B. MacKechnie, Clerk

19 By: \_\_\_\_\_  
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